LEBUHRAYA SHAPADU SDN BHD A

v.

TUAH GUARDS (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
LEE SWEE SENG JC
[SUIT NO: S22-216-2009]
22 JULY 2010

CIVIL PROCEDURE: *Execution - Stay - Application for - Summary judgment - Winding up - Recoverability of judgment sum - Irreparable damage - Overall justice of case - Conditional stay order* C

The plaintiff, who had appointed the defendant to provide "Cash Management Solution" services for the New North Klang Straits By-pass Expressway with respect to procession notes and coins collected by the plaintiff, contended that the defendant had failed to deposit the outstanding cash toll-collection to it. The defendant had only remitted RM55,278.70 and owed the plaintiff the total sum of RM1,131,213.22. The plaintiff claimed against the defendant for this amount and successfully obtained summary judgment; the defendant filed an appeal against that decision. The defendant subsequently applied to this court for a stay of execution of the judgment, necessitated by the plaintiff serving a notice of winding up under s. 218 Companies Act 1965 on the defendant due to its inability to pay its debts. The defendant averred, *inter alia*, the following grounds: (i) since the plaintiff had receivers and managers appointed and must be suffering financially, the judgment sum – if paid to the receivers and managers – would be irrecoverable should the plaintiff go into liquidation; and (ii) should the defendant be wound up, it would suffer irreparable damage as its 400 Malaysian employees would be unemployed and would not be able to return to their jobs even if the defendant's appeal were allowed. It was further submitted that this would negatively affect the country's economy. D E F G H

Held (allowing a conditional stay of execution):

(1) In respect of issue (i), the receivers and managers could not be prevented from doing their job of paying the plaintiff's creditors the monies due and owing to them. It might be said that the plaintiff's present predicament was due partly to the I

non-payment of the judgment sum of RM1,131,213.22. The defendant's possible quandary must thus not be viewed in isolation of the plaintiff's present plight. (para 11)

(2) As for issue (ii), certain foreseeable consequences come naturally from certain conduct and all that the defendant had to do to avoid such dire consequences was to pay the debt. The defendant should give more credit to the resiliency of the Malaysian workforce. This court had not heard of any jobless person dying of hunger or starvation. If there is no job in one place they will look for one in another. Moreover, there is the social support system of families and friends, and if one is enterprising enough there is always something to do to make a living. Should the defendant go down-under there is always the possibility of it being taken over by a competitor who might be keen in their contracts and human resource. The mere joblessness of some 400 Malaysians would not negatively affect the Malaysian economy, especially when the defendant itself admitted that more than 70% of its employees were low-wage earners. Even if the defendant were wound up it could always apply to court (if it succeeded on appeal) for a permanent stay of the winding up order, with the result that the company be reverted to its position as if it had not been wound up. The defendant could also apply for its appeal to the Court of Appeal to be heard as soon as possible. (paras 13-15)

(3) The defendant said it was a company with more than 30 years of history and experience. If so, it should have little problem raising financing or inviting investors to come in and help raise the money needed. (para 16)

(4) Considering that the plaintiff had a public duty to perform in collecting toll and maintaining the highway – but that it was under receivership – and looking at the overall justice of the case, the ends of justice would be served by the making of a conditional stay order. (para 20)

[Order accordingly.]

Case(s) referred to:

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbsusaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

Petricevic v. Bridgecorp Management Serviced Ltd (in rec) [2008] NZCA 286 ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218

For the applicant/defendant - Stanley Sinappan (Nur Hidayah Fadzilah with him); M/s Vazeer Akbar Majid & Co

For the respondent/plaintiff - Jananee Gopal; M/s Chellam Wong

Reported by Suresh Nathan

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] The court is often asked to hold as it were in a balance the two diametrically opposite principles of on the one hand that a successful litigant is not to be deprived of the fruits of its litigation just because the unsuccessful party is appealing and on the other hand that if the unsuccessful party should succeed on appeal then the appeal should not be nugatory.

[2] It has often been said that the unsuccessful defendant will have to show special circumstances to justify a stay of execution of a judgment obtained against it.

[3] The application before the court for a stay of execution will explore these issues.

Parties

[4] The plaintiff had on 7 July 2004 appointed the defendant to provide the services of a 'Cash Management Solution' for the New North Klang Straits By-pass Expressway with respect to

processing notes and coins collected by the plaintiff. These were to be transferred into the plaintiff's account and in consideration of such services,the plaintiff was to pay the defendant.

Problem

[5] The plaintiff contended that the defendant had failed to submit and/or deposit the outstanding cash toll-collection to the plaintiff as mutually agreed. The defendant had only so far remitted a total of RM55,278.70. Therefore, taking that into account, the defendant still owed the plaintiff a total sum of RM1,131,213.22 and the plaintiff claimed against the plaintiff for *inter alia* this amount and proceeded successfully to enter summary judgment against the defendant on 30.3. The defendant filed their appeal against the summary judgment entered.

Prayer

[6] The defendant subsequently applied to this court for a stay of execution of the judgment. This was necessitated by the fact that the plaintiff had subsequently served a s. 218 Companies Act 1965 Notice on the defendant as a pre-requisite to wind-up the defendant on the ground of inability to pay its debts.

Principles

[7] This area of law on circumstances that would justify a stay of execution on a judgment is well-trodden territory.There was at one stage the uncertainty as to whether the nugatory test was a different and separate test from the special circumstances test; a debate that started with the pronouncement of Gopal Sri Ram JCA (as he then was) in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 CA, that the special circumstances test is no longer good law. The reverberations and ripples that resulted was finally laid to rest by the decision of Abdul Hamid Mohamad JCA (as he then was) in a carefully considered judgment and comprehensive analysis of the principles governing stay in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 as well as by Augustine Paul JCA (as he then was) in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbsusaha Makmur Bhd* [2003] 4 CLJ 1.

[8] What was said by Abdul Hamid Mohamad JCA (as he then was) bears repetition: A

> The approach taken by most judges appears to be that a successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special circumstances (or special grounds) that justify a stay of execution to be granted. The weight of authorities appears to me to say that the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal). Many judges considered the question whether the appeal, if successful, is rendered nugatory under the head of special circumstances. (Sometimes, the phrase used is whether the appellant, if successful, can be restored to its former position). The general view appears to be that that is the more, if not the most, important factor of all. Of course, no one ever attempts to define special circumstances, for good reasons. It is also a common view that it depends on the facts of a particular case. Thus, "business realities" has been taken into consideration, I believe under this head. It is a common view that merits of the appeal (or correctness or validity of the judgment) is not special circumstances. Some judges do not use the term "special circumstances". They straight away consider whether the appeal, if successful, would be rendered nugatory. Examples are *Mohamed Mustafa* and *Gentali (M) Sdn. Bhd. v. Kawasaki Sunrock Sdn. Bhd.* [1996] 3 MLJ 597 (CA) and the term was used "in the sense that the appellant is deprived of the fruits of his success." I think it does not matter whether the nugatory factor is considered under the head "special circumstances" or not, so long as it is considered.

B C D E F

[9] If further elucidation is necessary one need only refer to the Federal Court case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, 16 where in the words of Augustine Paul JCA (as he then was) drawing from the language of classification in science it was both sublimely and succinctly set out as follows: G

> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered

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A nugatory if stay was refused what it means is that a special circumstance has been established. Thus they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related.

B **[10]** In short, it is not an 'either-or' conundrum but a 'both-and' choice that is not complicated and more common-place. One is a subset of the other and there is no need to pit one against the other or to squeeze one out of the other. It appears that proponents and opponents of the two tests were actually on the C same side though ostensibly different words were used in proffering seemingly opposing views. A case of setting out in opposite directions and yet arriving at the same spot because the earth is round!

D **[11]** Applying now the test of 'special circumstances' let us see if the circumstances set out by the defendant amount to that. First it is stated that the plaintiff had receivers and managers appointed and so must be in some dire financial straits and if the judgment sum is paid to the receivers and managers, this sum would be E irrecoverable should the plaintiff go into liquidation. One cannot prevent the receiver and manager from doing its job of paying creditors of the plaintiff the monies due and owing to them. Might it not be said that the plaintiff's present predicament is due partly to the non-payment of the judgment sum of RM1,131,213.22. F The defendant's possible predicament must not be viewed in isolation from the plaintiff's present plight.

[12] Second, it was advanced on behalf of the defendant that should they be wound-up, it would suffer irreparable damage in G that the defendant's 400 Malaysian employees will face unemployment and that they will not be able to return to their employment even if the defendant's appeal be allowed. The defendant lamented that there would be no company to return to and on the national level, our economy will be negatively affected H by the unemployment of 400 Malaysians.

[13] Perhaps the defendant can be forgiven for wallowing in the mud and mire of melancholic morbidness. Certain foreseeable consequences come naturally from certain conduct. All that the defendant has to do to avoid such dire consequences is to pay I up the debt!

[14] The defendant should give more credit to the Malaysian workforce. The Malaysian workforce is more resilient than we think. We have not heard of any jobless persons dying of hunger or starvation. If there is no job in one place they will look for one in another. Moreover there is the social support system of families and friends and if one is enterprising enough there is always something to do to make a living. Should the defendant go down-under there is always the possibility of it being taken over by a competitor who might be keen in their contracts and human resource. I fail to see how merely because some 400 Malaysians are jobless that would negatively affect the Malaysian economy when by the defendant's own admission more than 70% of its employees are low wage earners.

[15] In any event even if the defendant be wound-up, at any time it is successful on appeal it can always apply to court for a permanent stay of the winding-up order with the result that the company be reverted to its position as if it had not been wound-up. There is a further thing which the defendant can do which is to apply for hearing of the appeal to the Court of Appeal to be heard as soon as possible.

[16] The defendant said that it is a company with more than 30 years of history and experience. If so, it should have little problem raising financing or inviting investors to come in and help raise the money it needs to avoid all the consequences it fears.

[17] The defendant must be commended for stating affirmatively that it does not intend to prejudice the plaintiff in any way and as part of walking its talk it proposes to set aside a sum of RM100,000 every month paid into this Honourable Court until the defendant's appeal is disposed of, or until the money reached the judgment sum (whichever comes first). If the defendant had set aside such a sum since April 2010 since judgment was obtained on 30 March 2010 it would have set aside about RM400,000 already.

[18] I have looked for cases in other jurisdictions to see how the courts balance the conflicting principles in a case where the successful party is in receivership and the unsuccessful party is appealing against the judgment and the court is called upon to grant a stay of execution.

[19] *Petricevic v. Bridgecorp Management Serviced Ltd (in rec)* [2008] NZCA 286 is a New Zealand Court of Appeal case on provisions not dissimilar to our own where the judgment creditor is in receivership. William Young P in delivering the oral judgment of the court said:

> [58] I am satisfied on the basis of the evidence I have heard, having given full weight to counsel's helpful submissions, that Mr Petricevic is able to access money when he needs or wants it, whether from the Trust or from assets he has not fully disclosed. The evidence he has chosen to put before the Court falls well short of satisfying me he is not in a position to give some form of adequate security. If I am wrong in that, then Mr Petricevic is indeed insolvent and as soon as he is adjudicated the better, so that past relevant dispositions can be examined and unnecessary further litigation, both pending and contemplated, is avoided.
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> [59] The duty I have is to balance the interests of both parties so that first the appeal itself does not become nugatory and secondly the interests of the judgment creditor are not eroded or imperilled.
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> [60] In terms of the powers I have in the exercise of my discretion under r. 12, I consider the appropriate balance can be reached by imposing a condition under r. 12(4)(b). I therefore am prepared to grant the stay sought, but such stay is to be subject to the condition that $576,100 is to be paid into the High Court's trust account pending the final determination of the appeal by the Court of Appeal. I have opted for the amount of the alleged loan, or the payment made by BMSL to the IRD on Mr Petricevic's behalf which he does not dispute, rather than the full judgment sum which includes interest and costs.
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> [61] I attach as a further condition that the sum I have stipulated of $576,100 is to be paid to this Court's trust account no later than 5 pm on Tuesday 15 July 2008.
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> [62] To put the matter beyond doubt, if that condition is not met, if there is no such payment, then execution of the judgment can proceed.

Pronouncement

[20] Considering the fact that the plaintiff has a public duty to perform in collecting toll, maintaining the highway and its upkeep but that it is under receivership and looking at the overall justice of the case, I hold that the ends of justice would have been

served by the court making a conditional stay order. On 23 June 2010 the court made the order in the following terms: Stay of execution conditional upon the defendant making a payment of 50% of the judgment sum plus interest and cost to a joint-solicitors' account within one week from the date of the order and the balance within three calendar months from the date of the order. If any of the conditions are not met, the plaintiff is entitled to proceed with the enforcement of the judgment and the monies already paid into the joint-solicitors' account shall be released to the plaintiff. Cost shall be cost in the cause.

Postscript

[21] In less than a perfect world, this is the best and most balanced solution the court can arrive at. The claims of the plaintiff's creditors are for the moment postponed and the judgment sum plus interest is secured in a joint-solicitors' account. In the event the appeal is dismissed the sum so paid into the joint-solicitors' account plus whatever interest that the monies might have yielded in fixed-deposit shall be released to the plaintiff. In the event the appeal is allowed, the said sum plus whatever accrued interest there might have been from placing the monies in fixed-deposit shall be released to the defendant.

[22] Placing the monies in a joint-solicitors account has the advantage of earning interest at the commercial bank's rate which is currently at 3% per annum unlike depositing the monies in court and it saves the court the administrative work of processing the deposit of the monies and when monies have to be released there is also the inevitable administrative delay if the monies have been so paid into court. Indeed for conditional stay that is now the preferred mode of paying the monies into a joint-solicitors' account rather than having to pay it into court.